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No. 97-1680

In The

Supreme Court of the United States

October Term, 1997

FRANK M. ROSSETTO, JERRY SKIDMORE, JOHN S. BOROWSKY, GENEROSO SIMONS AND MACHINISTS DISTRICT 10, individually and as representatives of a class of persons similarly situated,

Petitioners,

vs.

PABST BREWING COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals properly held that, absent the consent of the individual retirees and the employer, the union lacked standing to represent the retirees in arbitration under the terms of the collective-bargaining agreement?

PARTIES TO THE PROCEEDING

The petition contains no list of the parties to the proceeding.

S&P Company, a privately held corporation, is the corporate parent of respondent Pabst Brewing Company. There are no non-wholly owned subsidiaries of Pabst Brewing Company.

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CORRECTED STATEMENT OF THE CASE

I. The Proceedings Before The District Court.

This dispute centers around Article XI of the collective-bargaining agreement ("CBA") between petitioner District 10 of the International Association of Machinists and Aerospace Workers AFL-CIO ("District 10") and respondent Pabst Brewing Company. Section 1 of Article XI provides for the filing and processing of "[a]ll grievances or misunderstandings between the Company and *its employees*." (App. 2a (emphasis supplied)) Section 2 of Article XI provides that "[a]ny grievance that cannot be satisfactorily settled" may be appealed to arbitration by the Union. (Id.) On August 12, 1996, District 10 submitted a grievance (the "grievance") to respondent, purportedly on behalf of the petitioner-retirees, rather than on behalf of any of respondent's "employees." The grievance challenged respondent's August 1 notice to the retirees that it intended to terminate their collectively-bargained health benefits. (Id.)

On September 17, 1996, after respondent had denied the grievance, all of the petitioners joined in the filing of a complaint for injunctive relief and money damages in the Eastern District of Wisconsin. (Id.) Petitioners therein alleged that the retirees' health benefits were "lifetime" in duration and that respondent's threatened termination of those benefits was unlawful. (Id.) Counts I and II of the Complaint purported to set forth claims for relief under both § 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185, and § 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C.

§ 1132, respectively, but made no mention whatsoever of arbitration. (Id.)

On January 30, 1997, petitioner District 10 served respondent with a notice of intent to appeal the grievance to arbitration under Article XI, Section 2 of the CBA. (App. 2a-3a) Respondent refused to arbitrate with District 10 and, on February 13, 1997, petitioners filed an amended complaint. (App. 3a) Counts I and II were repleaded verbatim and petitioner District 10 for the first time, in a new Count III, sought an order under § 301 of the LMRA compelling respondent to arbitrate the retirees' claims pursuant to the CBA.[1] On February 27, 1997, respondent moved to dismiss all three counts of the Amended Complaint and filed a two-count counterclaim for declaratory judgment, seeking an order that its termination of retiree benefits was not violative of either ERISA or the LMRA. (Id.)

On March 4-6, 1997, after certifying the individual petitioners as class representatives for all forty-one of the District 10 retirees, the District Court conducted a preliminary injunction hearing that, at petitioners' request, was governed by the standards of *Local Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981) (i.e., a so-

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[1] While petitioners' "Statement of the Case" makes no mention of the initial Complaint, the Amended Complaint alone demonstrates unequivocally that petitioners were attempting to create a "heads I win, tails you lose" situation for the retirees: if District 10 did not prevail in the arbitration (i.e., if the arbitrator did not order respondent to continue the health benefits), the retirees would be free to disavow representation by District 10 and pursue a "second bite at the apple" by returning to federal court.

called reverse-*Boys Markets* injunction). (Id.) The Magistrate Judge "compel[led] arbitration of the breach of contract claim found in Count I" (App. 10a) and enjoined respondent from terminating retiree benefits pending resolution of the arbitration.[2] (App. 3a) Although petitioners' "Statement of the Case" makes no mention of it, the District Court retained jurisdiction over the retirees' ERISA claim (Count II) (App. 6a) and set a briefing schedule on respondent's motion to dismiss that claim. That motion remains undecided to this day.

II. The Proceedings Before The Seventh Circuit.

On appeal, respondent argued *inter alia* that because, under the terms of the CBA, the only disputes that can be appealed to arbitration are un-settled grievances of "employees," and because retirees are not "employees" as a matter of law under *Allied Chemical & Alkali Wkrs. Of Am. Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 172 (1971), the retirees' claims did not fall within the scope of the agreement to arbitrate. Petitioners responded by arguing that the District Court had properly found that the dispute was arbitrable under the CBA. The Seventh Circuit, however, chose not to address the dispute in terms of arbitrability. Rather, the court examined and dissected the tripartite relationships of District 10, the retirees and respondent. A number of irrefutable propositions are clearly laid out in the opinion. First, "any claims for benefits here belong to the retirees individually."

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[2] The petitioners' "Statement of the Case" erroneously states that the district court "compel[led] arbitration of District 10's grievance." (Pet. 4)

(App. 5a) Second, under Article XI of the CBA, respondent and District 10 agreed to arbitrate only claims in which "District 10 serves as the grievants' representative." (App. 4a) Third, although District 10 bargained retiree benefits into the CBA with respondent (and as a result, has some amorphous interest in seeing the CBA "enforced"), that alone does not establish District 10 as the retirees' *exclusive* representative. (App. 7a-8a) Fourth, an award adverse to petitioner-District 10 in arbitration on the breach of contract claim (Count I) would extinguish the petitioner-retirees' ERISA claims (Count II) in federal court (App. 6a). Finally, because "[t]his record contains no evidence" that each of the forty-one retirees making up the certified class had assented to representation by District 10, the union "lack[ed] standing to bring the retirees' grievance to arbitration." (App. 8a)

Immediately upon receipt of the Seventh Circuit's October 17, 1997 opinion, respondent ceased paying for retiree benefits, but petitioners have declined to seek any further injunctive relief from the District Court.

III. The Petitioners Mischaracterize The Seventh Circuit's Decision.

In order to frame the issue here so as to make it superficially attractive to this Court, petitioners intentionally mischaracterize *Rossetto* as broadly holding "that whether a grievance is arbitrable depends on the status of the individuals affected by the grievance, even where the resolution of the grievance involves the interpretation of

the collective bargaining agreement." (Pet. 8-9) This misreading improperly extends the reach of the Seventh Circuit's decision beyond its own express limitations.[3] On not one but two occasions, the Seventh Circuit made clear that it was indeed *not* holding that unions can *never* represent retirees in arbitration. (*See* App. 5a ("This is not to say that a union can never take retirees' claims to arbitration.") and App. 7a ("We reiterate that we are not holding that a union can never represent retirees in arbitration."))

Although it is the touchstone of the Seventh Circuit's decision, neither petitioners' "Question Presented for Review" nor the question posed in the text of the Petition (Pet. 9) addresses the need for individual consent to an alternative forum for redress. Even if District 10 were the exclusive bargaining representative of the retirees – which this Court's decision in *Pittsburgh Plate Glass* clearly rejects – the consent of each of the individuals to the arbitral forum would still be a condition precedent to arbitration. (App. 8a) It was precisely because of the profound absence of such consent in this record that the Seventh Circuit's use of the word "hijack" (App. 7a) was

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[3] In addition to its overt mischaracterization of the Seventh Circuit's holding, there are at least two misleading presumptions included in petitioners' "Question Presented For Review." First, petitioners imply that the CBA actually contains a "requirement" that the employer provide retiree health benefits. That, however, is the crux of the dispute that District 10 sought to arbitrate and which is currently pending in the District Court. Second, as petitioners have framed the issue, this Court might be misled to believe the CBA is still in effect; it is not. (*See*, Pet. 3)

particularly appropriate. But the Petition ignores that too, presenting to this Court a "question" that bears little resemblance to the Seventh Circuit's decision. The Seventh Circuit did not hold that "the union party to a collective bargaining agreement" *cannot* "enforce the agreement's requirement that the employer provide health insurance benefits to retired employees." (Pet. i) Based on *Rossetto* alone, the best answer to petitioners' question is: "maybe, maybe not, depending upon whether the individuals in question have chosen to relegate their federal causes of action to a contractually-created arbitral forum wherein the union will act as their exclusive representative, and whether the employer has also so agreed."

REASONS FOR DENYING THE WRIT

I. The Purported Conflicts With The Decisions Of Other Circuit Courts And With Seventh Circuit Precedent Are Illusory.

A. There Is No "Split" Among The Circuits.

The Petition cites no authority holding that, as a matter of law, a union is the exclusive representative of retirees in arbitration with their former employer. Nor does the Petition cite any authority holding that individual retirees need not consent as a precondition to having their collectively-bargained benefits determined by another party outside of a federal forum. No such authorities are cited in the Petition because, quite simply, none exist. In the absence of a genuine split among the Circuits, petitioners are left with the mere assertion that the

Seventh Circuit's "failure" to address this case in terms of arbitrability (rather than individual consent and standing) places it out of sync with the approach taken by other Circuits, and that its analysis constitutes a departure from its own prior rulings. Neither of those assertions is true.

In *Meza v. General Battery Corp.*, 908 F.2d 1262 (5th Cir. 1990), the Fifth Circuit undertook an in-depth analysis of the consent requirement and came to the same conclusion as *Rossetto*:

> Absent some evidence that past members expressly or impliedly authorized the union to proceed in their behalf, there can be no presumption that the Union had authority to act in a representative capacity.

Id. at 1271. In reaching its conclusion, the *Meza* court relied in part on the Seventh Circuit's opinion in *Merk v. Jewel Cos.*, 848 F.2d 761, 766 (7th Cir.), *cert. denied*, 488 U.S. 956 (1988). There, as in *Rossetto*, the Seventh Circuit discussed the need for a tripartite agreement to arbitrate because the union is not, under *Pittsburgh Plate Glass, supra*, the retirees' *exclusive* representative.

The Second Circuit has expressed similar doubt as to whether the union "has standing under the CBA to assert the rights of individual retirees in a dispute with a former employer." *Schweizer Aircraft Corp. v. Local 1752, Intern. Un., UAW*, 29 F.3d 83, 87 (2nd Cir. 1994). As in *Rossetto* and *Meza*, the Second Circuit's doubt stems from this Court's ruling in *Pittsburgh Plate Glass*. In *Schweizer*, however, the Second Circuit did not need to reach the

standing issue because the grievance had been filed while the individual whose rights were at stake was still an active employee (i.e., a member of the bargaining unit for whom the union is the exclusive representative). *Id.* Thus, contrary to the assertions in the Petition, the opinions in *Meza, Merk* and *Schweizer* demonstrate that *Rossetto* is not the first time that a Circuit Court – or even the Seventh Circuit itself – addressed the issues of consent and standing in the context of a labor dispute involving the rights of retirees.

By its very nature, the Seventh Circuit's decision seeks harmony – not conflict – with the decisions of other Circuit Courts. *Rossetto* expressly leaves open the possibility that if all of the retirees, the union and the employer each agree that retiree disputes will be settled through binding arbitration, so be it. *Rossetto* also expressly notes that other Circuit Courts have compelled an employer to arbitrate with the union acting as the representative of aggrieved retirees. (App. 8a) Those courts, however, did not even address the issue of individual retiree consent in any respect, much less hold contrary to *Rossetto*. For example, in *United Steelworkers of America v. Canron, Inc.*, 580 F.2d 77, 80 (3rd Cir. 1978), the Third Circuit found that the district court had "correctly perceived [its] role to be limited to merely determining whether the issue was arbitrable." Relying upon the language in a footnote of one of its earlier decisions, the Third Circuit was content to entrust the retirees' rights to resolution through arbitration because it found that the union had not "los[t] all interest in the fate of its members once they retire[d]." *Id.* at 81. The opinion does not reveal whether individual retiree consent was presumed

or whether it simply was not an issue that concerned either of the parties or the court. The same is true of the Eight Circuit's opinion in *Local 589, Int'l Ladies' Garment Workers' Union v. Kellwood Co.*, 592 F.2d 1008 (8th Cir. 1979). As in *Canron*, the Court made no mention of individual consent. Rather it focused on when the rights at issue had accrued and relied upon *Nolde Brothers, Inc. v. Bakery & Confectionery Workers' Union*, 430 U.S. 243 (1997), in reaching a result not inconsistent with *Rossetto*. The Eighth Circuit did not discuss the concept of standing and apparently saw no reason to consider applying the teachings of *Pittsburgh Plate Glass*.

Finally, unlike the CBA in *Rossetto*, the Circuit Courts in both *Canron* and *Kellwood* were faced with broad arbitration provisions evidencing the respective employer's consent to arbitrate with a union acting as the representative for retirees. In *Canron*, the employer and the union agreed to arbitrate all grievances "as to the meaning and application of the provisions of the[ir] contract." *Canron*, 580 F.2d at 79. In *Kellwood*, the parties agreed to arbitrate all grievances, which were defined as any "claim[s] that [the collective-bargaining agreement] has been violated or a claim which requires interpretation of [the collective-bargaining agreement]." *Kellwood*, 592 F.3d at 1010, n. 4. In the face of such expansive contract language, the fact that the retiree consent issue was not addressed head-on in either decision is understandable and cannot create the type of conflict worthy of this Court's attention.

In a further attempt to manufacture a conflict between the Circuits, petitioners also cite *Communication Workers of America v. Michigan Bell Telephone Co.*, 820 F.2d

189 (6th Cir. 1987), and *United Food & Commercial Workers Local 197 v. Alpha Beta Co.*, 736 F.2d 1371 (9th Cir. 1984), as having "rejected the proposition that the union's right to arbitrate depends upon whether the employees are in the bargaining unit." (Pet. 8) *Alpha Beta* involved a dispute over payments into a union trust fund and, in *Michigan Bell*, the union sought arbitration with respect to the rights of its own representatives to collectively-bargained benefits. Neither case involved retirees, and neither addressed the issues of standing or consent to union representation. Nor did either of these cases cite or rely upon *Pittsburgh Plate Glass*, in whole or in part, in order to reach their respective results. For these reasons, neither *Michigan Bell* nor *Alpha Beta* "conflicts" with *Rossetto*.

B. *Rossetto* Does Not Conflict With Seventh Circuit Precedent.

Petitioner argues that *Rossetto* is a dramatic departure from the Seventh Circuit's previous ruling in *Independent Lift Truck Builders Un. v. Hyster Co.*, 2 F.3d 233 (7th Cir. 1993). (Pet. 7-8) It is not. Unlike the CBA in *Rossetto*, it was unclear whether the term "employees" as used in the *Hyster* agreement was meant to encompass retired employees, thus leaving as an open question whether the parties consented to arbitration of disputes involving retiree health benefits. In *Hyster*, the Court reasoned that "if retired employees are covered by the agreement, then the union has standing," (*Id.* at 235) and remanded the case to the district court to determine if the agreement covered retirees. *Id.* at 237. In *Rossetto*, reversing that same logic, the Seventh Circuit similarly held that the union did *not* have standing because the retirees were *not*

covered by the contract that contained the agreement to arbitrate and, thus, had not consented to arbitration. "Coverage" in *Hyster* and "standing" in *Rossetto* are, in effect, two sides of the same coin.

II. *Rossetto* Does Not Call For This Court To Revisit *Pittsburgh Plate Glass.*

In urging this Court to review *Rossetto,* petitioners imply that the Seventh Circuit invoked *Pittsburgh Plate Glass, supra,* in a manner and for a purpose never intended by this Court. Notwithstanding the fact that both the reasoning and holding of *Rossetto* are clearly in keeping with both the letter and spirit of this Court's decision, Petitioners' attempt to misuse the Seventh Circuit's ruling as an opportunity to question whether *Pittsburgh Plate Glass* stands for the proposition that a union is "deprived of the right to enforce its agreement with respect to retiree benefits because it is not the exclusive bargaining representative of retired employees."[4] (Pet. 9) That issue is not, however, properly before this Court because the Seventh Circuit specifically stated that it was *not* holding that a union could *never* enforce the rights of retirees to collectively-bargained benefits. Rather, it held only that, under the terms of the CBA here and absent the

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[4] The union-oriented focus of petitioners' analysis again exalts District 10's rights over those of the individual retirees. That mind-set is precisely what the Seventh Circuit's decision is intended to guard against; the court found it improper for a union to battle with an employer in a non-federal forum over individual rights that belong to third-parties, namely the retirees.

requisite consent, arbitration was not the proper forum and District 10 was not the proper representative party to pursue the individual rights of the retirees.

The Petition then makes a series of arguments based on a selective reading of the footnotes in *Pittsburgh Plate Glass*. First, petitioners assert that this case presents the issue "left unresolved by the court in *Pittsburgh Plate Glass*." (Pet. 10) In *Pittsburgh Plate Glass*, however, if this Court left any issue for another day it was the question of "whether retirement rights are enforceable" (404 U.S. at 176, n. 17) not the questions raised by petitioners (i.e., *where* retirement rights can be enforced and *who* can enforce them outside of federal court). The answers to petitioners' questions can be found in *Pittsburgh Plate Glass* itself, where this Court noted that "Congress has specifically established a remedy for breaches of collective-bargaining agreements in § 301" of the LMRA (*Id.*) and that it would be "the *retiree* [who] would have a federal remedy under § 301[] if his benefits were unilaterally changed." *Id.*, at 181, fn. 20 (emphasis supplied). Petitioners overlook those unequivocal statements and, instead focus on another footnote in which this Court understandably declined to speculate as to whether the dispute at issue would have been subject to arbitration under the collective-bargaining agreement present in that case. (Pet. 10) The underlying dispute in *Pittsburgh Plate Glass* may or may not have been arbitrable, and the Seventh Circuit's decision properly leaves open that very same possibility for future cases. In short, *Rossetto* does not require this Court to revisit *Pittsburgh Plate Glass*, which has been the foundation of a body of well-settled

law for more than twenty years, nor does it call for any express limitation to be placed on that decision.

III. This Case Does Not Present A Novel Or Important Federal Question.

Petitioners make much ado over *Rossetto*'s reliance on the Seventh Circuit's prior decision in *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 294 (1997). There, the Seventh Circuit held that "the union cannot consent *for* the employee by signing a collective bargaining agreement that consigns the enforcement of statutory rights to the union-controlled grievance and arbitration machinery created by the agreement." *Id.* at 363 (emphasis in original).[5] The only arguable nuance that sets *Rossetto* apart from *Pryner* is the nature of the relationship between the individual whose rights are at issue and the union seeking to assert those rights. *Pittsburgh Plate Glass*, however, is sufficient to bridge that gap because it makes clear that, unlike the employee in *Pryner*, the union's representation of the retirees in *Rossetto* is not exclusive in nature.[6] If the union

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[5] Apparently concerned over its adverse implication, petitioners' partial citation to *Pryner* fails to reference denial of the writ petitioned therein.

[6] The CBA obligated the parties to arbitrate only those grievances that could not be satisfactorily settled. (App. 2a) Under this Court's holding in *Bowen v. United States Postal Service*, 459 U.S. 212, 225 (1983), the union acts as the representative for the grievants in arbitration with the employer, but the Seventh Circuit found significance in the fact that the grievants in this instance were retirees to whom District 10 owed no duty of fair representation and for whom District 10 was not the exclusive bargaining representative. (App. 4a)

in *Pryner* could not consent to arbitration on behalf of an active employee (for whom it *is* the exclusive representative and to whom it owes a duty of fair representation) then how could District 10 possibly consent for each of the retirees (for whom it is *not* the exclusive representative and to whom it owes no duty)? Quite simply, as the Seventh Circuit correctly held, it could not, particularly where the employer resisted that representation as well. The holding in *Pryner*, which this Court has declined to review, is consistent with the holdings of the majority of Circuit Courts. *See, e.g., Penny v. United Parcel Serv.*, 128 F.3d 408, 414 (6th Cir. 1997); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526 (11th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1453 (10th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3137 (U.S. Aug. 6, 1997) (No. 97-232); *Varner v. National Super Markets, Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 946 (1997); *Tran v. Tran*, 54 F.3d 115, 117 (2d Cir. 1995), *cert. denied*, 517 U.S. 1134 (1996). Only the Fourth Circuit appears to stand out with decisions such as *Wright. v. Universal Maritime Service Corp.*, Case No. 96-2850, 1997 U.S. App. LEXIS 19299 (4th Cir. 1997), *cert. granted*, ___ U.S. ___, 118 S. Ct. 1162 (1998), which this Court has opted to review.

Ignoring the significance of the fact that *Rossetto* involves retirees (rather than active employees) and equating the issues in *Pryner* and *Wright*, petitioners attempt to piggyback *Rossetto* onto this Court's issuance of a writ of certiorari in *Wright*. To do so, petitioners draw a superficial distinction between federal laws that confer "substantive rights" (such as the Americans with Disabilities

Act, the statute at issue in *Wright*) and those that, according to petitioners, create "only federal court jurisdiction" (such as § 301 of the LMRA and ERISA). (Pet. 11) Petitioners urge this Court to review *Rossetto* to address union attempts to force arbitration of the latter type of statute. However, petitioners' argument does nothing more than make a distinction without a difference. In each instance, Congress created federal remedies and provided for access to a federal forum. It matters not that the retirees' rights, if any, are defined in whole or in part by the CBA; they still belong to the retirees and are properly asserted in a federal forum. (App. 8a, *citing Anderson v. Alpha Portland Indus.*, 752 F.2d 1293, 1296 (8th Cir.) (*en banc*), *cert. denied*, 471 U.S. 1102 (1985)) The Seventh Circuit properly acted as the gatekeeper of the retirees' individual rights by searching the record for evidence of individual consent to binding arbitration. When that search revealed no consent, the Court in short order found that District 10 lacked standing to act as the self-appointed arbitration representative of the retirees. The Seventh Circuit correctly reasoned that District 10 could not "hijack" the retirees' individual rights by pursuing a remedy in a forum created by a contract to which neither the retirees nor any exclusive representative of their rights was a party. (App. 7a)

Clearly, neither the holding in *Rossetto* nor in *Wright* hinges upon whether the individual rights in question flow from a statutory source or a contractual one. The real distinction lies in the fact that *Wright* involves the apparent concerns of a *current employee* that his statutory claims will never be heard anywhere on the merits. The Petition here, in polar contrast, involves the efforts of

retirees to be heard twice: first for breach of contract in arbitration, then, if need be, for violation of ERISA in federal court. The retirees and District 10 filed their complaint on September 19, 1996, and were content to sit on it until February 13, 1997. It was on that latter date, for the first time, that they had second thoughts and brought the issue of arbitration to the attention to the District Court in a belated but obvious display of forum shopping. The Seventh Circuit would have none of it – for good reason – and neither should this Court.

Petitioners' attempt to wed this dispute to the pendency of *Wright* also fails because, as expressly stated in Wright's petition to this Court, "[t]his case presents squarely for review the *sole issue* of the continuing vitality of *Alexander v. Gardner-Denver Co.*"[7] (Wright's Pet., p. 12 (66 U.S. L.W. 3241) (emphasis supplied)) *Alexander* was neither cited to nor relied upon by the Seventh Circuit in *Rossetto*. Nor does *Alexander* involve retirees, whose status as such gave rise to the critical distinction in *Rossetto*. (*See*, App. 4a ("The grievants in this case, however, are retirees, and therein lies the problem."))

CONCLUSION

The fundamental concepts underlying the reasoning of *Rossetto* are individual autonomy, notice, due process and avoidance of duplicative litigation. Those concerns are not novel. They are not foreign to the context of

[7] *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

retiree disputes. They are not unique to the Seventh Circuit, and they are not contrary to the rulings of this Court. *Rossetto* is not an aberrant decision of a run-away Circuit Court. Nor is it the appropriate vehicle to revisit either *Pittsburgh Plate Glass* or *Pryner*, neither of which, standing alone, dictated the Seventh Circuit's holding. For these reasons and those set forth above, *Rossetto* does not merit further review by this Court and the Petition should be denied.

Respectfully submitted,

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